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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMAR LAVELL MANARD, Defendant and Appellant.	B211477 (Los Angeles County Super. Ct. No. MA036204)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa M. Chung, Judge. Affirmed in part and reversed in part.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Roberta L. Davis and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Jamar Lavell Manard, appeals the judgment entered following his conviction, by jury trial, for special circumstances first degree murder (during commission of attempted robbery) and attempted robbery, with firearm and gang enhancements (Pen. Code, §§ 187/190.2, subd. (a)(17), 664/211, 12022, 12022.53, 186.22, subd. (b)).[1] Manard was sentenced to state prison for a term of life without possibility of parole, plus 25 years to life.

The judgment is affirmed in part and reversed in part.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

a. *The murder and the investigation.*

Edward Sweatt was a cab driver for the Yellow Star Taxi Company. On the night of April 15, 2006,[2] someone named Tony called the company at 8:54 p.m. and requested a cab. The call was assigned to Sweatt.

About 9:00 p.m. that night, Jesse Pulido and a friend were parked on Fenhold Street at the intersection of Lightcap Street. Pulido heard a pop that sounded like a muffled gunshot, a squeal, and then a big crash. He saw a taxi cab crash into two cars. After the crash, two men got out of the cab and fled on foot.

Detective Eddie Brown of the Los Angeles County Sheriff's Department and his partner, Detective Jeffrey Leslie, responded to the scene. Sweatt's body was in the driver's seat of the cab. He had been killed by a gunshot wound to the head. The bullet had entered his right ear and exited from his left eye. Brown opined the gunman had been sitting in the right rear passenger seat of the cab.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] All further calendar references are to the year 2006 unless otherwise specified.

Two bandanas were recovered from the crime scene. DNA analysis connected defendant Manard to one and Dukwan Adderley to the other.[3] Manard's fingerprints were found on one of the rear passenger doors of the cab.

Rochelle Newman had been dating Manard for about five years. Newman lived in Hollywood but often visited her aunt's house in Lancaster. Manard lived a few blocks from the aunt's house. On the night Sweatt was killed, Manard, Adderley and Martin Ramsey visited Newman and asked to use her cell phone. Telephone company records show a call was placed from Newman's phone to the Yellow Star Taxi Company at 8:54 p.m.

Ramsey testified he was with Manard and Adderley when they borrowed the cell phone from Newman. Ramsey heard Manard call a taxi company using the name Tony. After making the call, Manard and Adderley talked about robbing a taxi and then they left. When Ramsey saw them again later that night, Manard said, "We killed the taxi man," and Adderley said, "We did it."

On September 12, Detectives Brown and Leslie questioned Manard after he was arrested. Brown believed there were two recording devices in operation: his personal tape recorder and the sheriff's department interview room videotaping system. At some point, Brown turned off his personal tape recorder at Manard's request, thinking the interview room system would preserve their conversation. However, it turned out the audio function on the interview room system was not working, so there is only a video record of the last part of this first interview.

During the taped portion of the first interview, Manard did not admit any involvement in the killing. But after being told his fingerprints had been found on the taxi cab door and that the detectives knew he had been in the cab, Manard said: "Let me explain this," and "I'll say it, but I will talk about it first with the recorder off." Brown testified that, during the untaped portion of the interview, Manard claimed Adderley and

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[3] Manard's DNA profile frequency was one in 10.8 quadrillion, and Adderley's was one in 1.9 quadrillion.

Ramsey had robbed the cab driver, but he admitted he had been in the cab too. He said the incident began when Adderley wanted to rob a taxi to get some money. Manard used Newman's cell phone to call the taxi company using the name Tony. He told the dispatcher to have him picked up at his old address on 12th Street. When the cab arrived he, Adderley and Ramsey got in. It was Adderley who shot the cab driver in the head.

The following day, September 13, Manard was interviewed again. This time the interview was recorded in its entirety. Manard admitted there had been only two passengers in the cab: himself and Adderley. Ramsey did not participate in the robbery because he had a bad leg. It was Adderley who called the taxi company using the name Tony. Manard gave Adderley his old address to be used for the pickup point. Manard sat on the left side of the cab's rear seat and Adderley sat on the right side. They were just going to rob the driver; no one was supposed to get shot. It was Adderley who killed the driver.

Detective Brown then brought Ramsey into the interview room to confront Manard. Ramsey said that after the robbery, he and Adderley got some marijuana and Adderley told him the whole story. Adderley said he had a "big ol' pistol," and that the cab driver started going too fast "so he did it bam."

b. *The gang evidence.*

William Pickett is a gang detective assigned to the Palmdale station. He is familiar with the Rollin' 60s, a criminal street gang affiliated with the Crips. In April 2006, the Rollin' 60s had about 1,200 members. The gang's primary territory is in South Central Los Angeles, but some of its members have migrated to the Antelope Valley.

Although the Crips and Bloods are bitter enemies in Los Angeles, in the Antelope Valley they associate with each other and commit crimes together. Whereas in South Central there are very specific gang boundaries, sometimes marked out street by street or apartment building by apartment building, this is not the case in the Antelope Valley where established territories don't mean as much: gangs "don't have to worry as much about turf-oriented problems in the Antelope Valley. . . . [B]eing a wide, open area . . .

they don't have to fight over neighborhoods and territories and apartment buildings and streets as [in South Central]." People "get along with each other" in the Antelope Valley who "would be bitter rivals and killing each other" in South Central.

The primary activities of the Rollin' 60s are robberies, as well as assaults with deadly weapons, burglaries, auto theft, gambling and prostitution. Pickett testified the Rollin' 60s "prided themselves, number one, on robberies. [¶] It was not uncommon to see Rollin' 60s who throw their . . . moniker or gang name on a wall and then brag by putting '211 crew' underneath it . . . 211 is the Penal Code for robbery. Showing that they commit robberies. [¶] From my experience and the individuals I have known from Rollin' 60s, especially a lot of the older guys, they were all in for robbery, the majority of the time." Older gang members specialize in robbing armored cars and casinos, while younger members commit "street robberies" such as ATM robberies, purse snatchings, and robbing postal workers, pizza deliverers, and cab drivers. Guns are typically used in taxi cab robberies.

Pickett opined Manard was a member of the Rollin' 60s. Manard had admitted his membership to various police officers and he had gang tattoos. Pickett himself had never met Manard, Ramsey or Adderley. He did not know if Adderley was a gang member.

The prosecutor posed a hypothetical question based on the assumption Sweatt had been killed during a robbery carried out "here in Lancaster [by] a Rollin' 60s Crip[4] member along with a Blood member, a Blood gang member who may or may not have usually [*sic*: eventually?] become a Crip – that's unclear, but we know at some point that he was Blood member . . . ." Pickett opined the crime would have benefitted both the Rollin' 60s gang and the individual Rollin' 60s member himself. The gang member would gain respect and stature in the gang hierarchy for his willingness to commit a violent crime for the gang. If the robbery had been successful, both the gang member and the gang would have benefitted monetarily. The gang would also benefit because this

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[4] The gang's name is spelled several ways in the trial transcript; this spelling is adopted in order to maintain consistency.

kind of crime helps to create "fear and intimidation within the community. Gang members can't work without it." It also helps in the recruitment of new gang members who want to be associated with a gang "known as . . . the meanest, baddest, and ugliest one in the neighborhood . . . ."

Pickett was asked about the phenomenon of perpetrators throwing gang signs or yelling out gang names to claim a crime while committing it. He testified this happens during crimes committed against rival gang members and he would not have expected it to occur in this case. Asked if it ever happened that a Blood gang member would switch allegiance and join a Crip gang, Pickett testified: "Yes. Except 'jumping' is what they call it. Very common up here [i.e., in the Antelope Valley]. Down below [i.e., in South Central], no. If you lived within that gang neighborhood and you say you are 'set jumped' over to a rival, you are going [to] get killed. Up here, because it is open, yes, you can get away with it."

2. *Defense case.*

Manard testified that because he did not have a car he regularly used Yellow Star Taxi for transportation. He took a cab five or six times a week and he knew the company number by heart. Manard had known Adderley since 2002. He believed that, in April 2006, Adderley belonged to the Crips because of the way he talked, but he also thought Adderley wanted to be a Blood. Manard himself was a Rollin' 60s gang member.

On the evening of April 15, Manard went to the neighborhood liquor store to meet Adderley and Ramsey. They planned to drink and smoke marijuana that night. Manard and Ramsey had marijuana, but Adderley had neither marijuana nor money. Adderley said he wanted to commit a robbery. Manard said he would help Adderley rob a liquor store, but Adderley said he wanted to rob a taxi driver. Because Ramsey refused to participate, Manard agreed to help Adderley. Manard was not armed and he didn't know at that point if Adderley was armed.

Manard borrowed Newman's cell phone to call Yellow Star Taxi. However, he didn't want to make the call himself because the taxi dispatchers would recognize his voice, so he had Adderley make the call. Adderley used the name Tony and told the dispatcher to send the taxi to the house where Manard used to live. Manard and Adderley walked to Manard's old house to meet the taxi. Manard told Adderley he would call off the robbery if he recognized the driver. Adderley showed Manard he was carrying a gun, but Manard did not think anyone would get shot.

The taxi arrived. The driver looked at Manard and said, "Hey, youngster, what are you doing over here?" Manard recognized Sweatt and said he was just trying to catch a cab ride to his girlfriend's house. Manard made eye contact with Adderley, gave him a "no-go" hand sign, and whispered that he knew the driver. Adderley shook his head in acknowledgment.

Manard and Adderley got into the taxi cab anyway. Manard testified he was just planning to get a ride to a friend's house and then "hop out without paying the taxi." Adderley sat on the right side of the rear passenger seat, and Manard sat on the left side. Manard was hoping Adderley wouldn't do anything stupid, but he realized that whatever happened "I put myself already there with him."

Manard directed Sweatt to make a right turn toward his friend's neighborhood, but Adderley told Sweatt to make a left. At that moment, Manard realized Adderley was planning to go through with the robbery because he was directing Sweatt to an area from which they had a better chance of making a getaway. Manard did not say anything. Adderley then directed the driver to make another turn, saying they were going to pick up a friend down the block. When Manard realized Sweatt had not understood what Adderley said, he repeated it: "I said, 'Oh, he's our friend down this block. We're going to pick him up.' " As Sweatt slowed the taxi to look for the fictitious friend, Adderley pulled his gun and demanded Sweatt's money. Sweatt turned around, looked at Adderley, and said, "You young motherfucker." Manard started laughing because Sweatt was being more aggressive than Adderley.

Adderley again demanded money and Sweatt said, "If . . . you're going to rob me . . . then we all going to die in this, motherfucker." Manard testified he had already started opening his door: "I thought [Sweatt] was going to give the money up and we was just going to hop out before he could get his car back in full motion. But before . . . my door would open, he pulled off in full speed." The cab hit a pothole and Adderley fell back, off balance. As Adderley was sitting himself back up the gun went off. Manard didn't know whether Adderley had fired intentionally. The cab began to swerve and then it crashed. Manard got out first. He heard Adderley pleading not to be left behind, so he pulled him out of the cab. When they saw people coming out of their houses, they ran.

Later that night, Manard saw Ramsey and told him Adderley had done "some stupid shit tonight," but he didn't give Ramsey any details. Manard testified Ramsey had not been involved in the robbery in any way. Ramsey had been invited along, but he didn't go because his leg was injured.

Asked about his repeating Adderley's statement to Sweatt that they were stopping on this block to pick up a friend, Manard testified:

"Q. Okay. You knew that what was going down was . . . a robbery . . . right?

"A. Yes.

"Q. There's no reason for Dukwan Adderley to say, 'Slow down here because my homey lives here'; correct? Because a homey didn't live around there; correct?

"A. I knew exactly what was going on."

Manard also testified:

"Q. And you helped out by saying the same thing that Dukwan Adderley had just said, 'A homey lives right down the house [*sic*], and we're going to go pick him up'; correct?

"A. Yes."

Manard acknowledged he never told Detective Brown he tried to call off the robbery after recognizing Sweatt: "Q. Back in 2006, did you ever tell this detective what you told us and the jury today, that you didn't want to do a robbery of Edward Sweatt?

Did you ever tell this detective that? [¶] A. I never brought up the situation of me knowing Edward Sweatt."

CONTENTIONS

1. The trial court erred by admitted a tape recording of the second police interview.

2. There was insufficient evidence to support the gang enhancement.

3. The trial court erred by sentencing Manard for both the gang enhancement and a firearm enhancement.

4. The abstract of judgment must be corrected.

DISCUSSION

1. *There was no Miranda error at the second interview.*

Manard contends the tape recording of his second police interview should have been excluded from evidence because he was not given a second *Miranda*[5] warning. This claim is meritless.

a. *Legal principles.*

"This court repeatedly has held that a *Miranda* readvisement is not necessary before a custodial interrogation is resumed, so long as a proper warning has been given, and 'the subsequent interrogation is "reasonably contemporaneous" with the prior knowing and intelligent waiver.' (*People v. Mickle* (1991) 54 Cal.3d 140, 170 . . . .) [¶] We have established several factors to determine whether readvisement is necessary prior to a subsequent interrogation held after an earlier valid *Miranda* waiver: 1) the amount of time that has passed since the initial waiver; 2) any change in the identity of the interrogator or location of the interrogation; 3) an official reminder of the prior advisement; 4) the suspect's sophistication or past experience with law enforcement; and 5) further indicia that defendant subjectively understands and waives his rights. [Citation.] In *Mickle*, we found that readvisement was unnecessary when 36 hours had elapsed between interrogations, because the defendant was still in custody, was

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[5] *Miranda v. Arizona* (1966) 384 U.S. 436 (86 S.Ct. 1602).

interviewed by the same interrogators, was reminded of his prior waiver and was familiar with the justice system, and there was nothing to indicate he was mentally impaired or otherwise incapable of remembering the prior advisement. [Citation.]" (*People v. Smith* (2007) 40 Cal.4th 483, 504,)

b. *Background*.

The September 12 interview started at 1:15 p.m. and lasted until 2:15 p.m. The September 13 interview started at 7:15 a.m., 17 hours later. No *Miranda* warning was given at the second interview. Manard was still in custody when the second interview took place, and he was questioned in the same interview room at the Lancaster sheriff's station.

At an evidentiary hearing, Detective Brown testified there was no indication Manard was mentally or developmentally impaired, or under the influence of drugs or alcohol. Manard never expressed any confusion about his *Miranda* rights, and his answers to the questioning were responsive and articulate. Brown was aware Manard had been arrested numerous times in the past, although he did not know if Manard had ever been given a *Miranda* warning before. At the second interview, Brown did not remind Manard about the earlier *Miranda* warning, but he had no reason to think Manard would not be able to recall what had happened the day before. Manard himself referred to the first interview, saying he had been "a little bit deceptive in some of his remarks the day before."

The trial court ruled the second interview was admissible, reasoning: "Seventeen hours I don't find is too great of a time. [There was no] change in the . . . the location of the interrogation . . . . [¶] An official reminder of the prior advisement, the court acknowledges that was not done. [¶] The suspect's sophistication or past experience with law enforcement. The court finds that he was fairly sophisticated with [his] prior contacts [with] law enforcement, but it's not clear in terms of prior experience with *Miranda*. [¶] And . . . there doesn't appear to be any objective evidence of mental impairment or any indication . . . that he did not understand. The context of the conversation appeared to be the same subject. [¶] So the court finds that under the

totality, under the test, that he was sufficiently aware of [his] rights. We'll not exclude it."

c. *Discussion.*

It is clear the trial court gave careful consideration to the *Mickle* factors. Although Manard quibbles with the manner in which the trial court weighed some of those factors, we agree with the trial court's conclusion the second interview was admissible.

Manard points out it was Detective Leslie, not Detective Brown, who gave him the *Miranda* warning at the first interview, and that Leslie was not present at the second interview. But Brown testified he was in the room when Leslie gave Manard the *Miranda* warning, and it was Brown who conducted the second interview. Hence, Brown was present at both interviews, and he and Leslie had been acting as a team at the first interview. This provided continuity between the first and second interviews. (Cf. *People v. Lewis* (2001) 26 Cal.4th 334, 387 ["although Detectives Lean and Christensen and Investigator Martin took turns interviewing defendant, this change in the identities of the interrogators does not alter the reasonably contemporaneous nature of the subsequent interrogation, which was part of an ongoing and cooperative process"].) That the second interview took place in the same location as the first interview helped establish this continuity.

Manard argues he "only impliedly waived his rights during the first interview." But valid *Miranda* waivers may be express or implied. (*People v. Whitson* (1998) 17 Cal.4th 229, 250 ["[D]ecisions of the United States Supreme Court and of this court have held that . . . an express waiver [of *Miranda* rights] is not required where a defendant's actions make clear that a waiver is intended"].) Manard's implied waiver was very clear. Asked, "Do you understand each of the rights explained to you?", Manard replied, "Yes, sir." The next question was whether Manard wanted to talk about the case, and he said yes.

Manard argues that, although he "later testified at trial regarding his prior felony convictions for commercial burglary and receiving stolen property, . . . the more relevant consideration was Detective Brown's representation at the pretrial hearing that he did not

personally know whether appellant had ever been advised of his rights following an arrest in the past." We disagree. A defendant's "sophistication or past experience with law enforcement" (*People v. Smith, supra,* 40 Cal.4th at p. 504) can be demonstrated without knowing if that experience included *Miranda* warnings. (See *id*. at p. 505 ["because defendant had been incarcerated in the [California Youth Authority] and arrested for domestic violence in 1990, defendant was quite familiar with the criminal justice system"]; *People v. Lewis, supra,* 26 Cal.4th at p. 386 ["there was some evidence that defendant had prior experience with police based on citations and warnings he received from the police"]; *People v. Riva* (2003) 112 Cal.App.4th 981, 994 ["he had previous experience with law enforcement having been arrested as a juvenile"].)

In sum, the trial court did not err by concluding the original *Miranda* warning was adequate because the second interview was reasonably contemporaneous with the first. (See *People v. Lewis, supra,* 26 Cal.4th at pp. 386-387 [subsequent interrogation was reasonably contemporaneous where it was five hours later, in the same interview room and defendant had some prior police experience, even though interrogator was different, defendant was 14 and subsequently diagnosed as paranoid schizophrenic, and there had been no reminder of the *Miranda* warning]; *People v. Miller* (1996) 46 Cal.App.4th 412, 418, disapproved on another ground in *People v. Cortez* (1998) 18 Cal.4th 1223, 1240, fn. 8 [second interview was reasonably contemporaneous where it was five hours later, conducted at same location by one of two detectives who had been present during first interview, but there was apparently no reminder of *Miranda* warning]; *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1972-1973 [second interview reasonably contemporaneous where it occurred nine hours later in completely different location and was conducted by same interrogator who apparently gave no reminder of *Miranda* warning.)

Hence, the trial court did not err by admitting evidence of the second interview.

2. *Sufficient evidence of gang enhancement.*

Manard contends there was insufficient evidence to support the gang enhancement finding. This claim is meritless.

a. *Legal principles.*

As we explained in *People v. Duran* (2002) 97 Cal.App.4th 1448:

"Section 186.22, subdivision (b)(1) imposes additional punishment when a defendant commits a felony for the benefit of, at the direction of, or in association with a criminal street gang. To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. [Citations.]" (*Id*. at p. 1457.) The gang statute then requires two further elements: evidence of "a felony committed for the benefit of, at the direction of, or in association with any criminal street gang" [hereafter the "benefit/direction/association element"] *and* evidence the felony was committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members [hereafter the "promote/further/assist element]." (§ 186.22, subd. (b)(1).)

"We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction." (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

" 'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].' [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.] Thus, when a criminal defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the crime of which he was convicted, we *must* begin with the presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of convincing us otherwise. To meet that burden, it is not enough for the defendant to simply contend, 'without a statement or analysis of the evidence, . . . that the evidence is insufficient to support the judgment[] of conviction.' [Citation.] Rather, he must *affirmatively demonstrate* that the evidence is insufficient." (*Ibid.*)

b. *Discussion*.

Manard asserts there was insufficient evidence to establish either the benefit/direction/association element or the promote/further/assist element of the gang enhancement allegation.

(1) *Sufficient evidence of benefit/direction/association element*.

Manard argues the benefit/direction/association element was not supported by sufficient evidence, citing the recognized difference between a truly gang-related crime and a crime that just happens to have been committed by a gang member. For instance, *People v. Martinez* (2004) 116 Cal.App.4th 753, held an auto burglary was not gang-related because "the circumstances of the offense . . . fail[ed] to connect the offense with defendant's gang activities. While the probation report indicates that the auto burglary was committed by defendant and a companion, the accomplice is not identified as a gang member. Nor does the probation report give us any indication that this particular auto burglary, even if committed by someone identified as a 'certified Sureno gang member,' was directed by, associated with, or benefited his criminal street gang. Neither the investigating officer nor the probation officer even suggested that the auto burglary was other than a crime intended to benefit defendant personally." (*Id*. at p. 762, fn. omitted.)

Manard argues his case is like *Martinez* because "the evidence demonstrated that appellant and Adderley had no gang purpose. Adderley simply wanted money so that he could drink and smoke marijuana with appellant and Marvin Ramsey on the night of the incident. There is nothing in this case to show that the crimes . . . were committed with a gang purpose in mind. Moreover, the record did not reflect that Adderley was a gang member, much less that appellant and Adderley were members of the same gang."

But Manard is ignoring the fact he himself testified Adderley belonged to a gang.[6] Given the unusual gang environment in the Antelope Valley, as testified to by Detective Pickett, it did not matter whether Adderley was claiming to be a Crip or a Blood on the day of the killing. Manard's commission of a crime in concert with a known gang member was evidence supporting the benefit/direction/association element. (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ["the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members"]; see also *People v. Leon* (2008) 161 Cal.App.4th 149, 163 [where People presented evidence defendant committed crimes "in association with Rodriguez, a fellow gang member," there was sufficient evidence defendant "committed the offenses 'in association with any criminal street gang' "].)

Moreover, Pickett testified robbery was a particular specialty of the Rollin' 60s Crips gang, and that the gang would benefit monetarily had this attempted robbery been successful. (See *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4 ["A gang expert may render an opinion that facts assumed to be true in a hypothetical question present a 'classic' example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence. [Citation.]"].) Pickett also testified Manard's gang would benefit because this kind of crime creates fear and intimidation in the community, and makes the gang more attractive to young recruits.

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[6] Manard in effect testified that, although he never heard Adderley utter the words "I am a Crip," it was obvious from "the words he used that . . . he was a Crip." Manard clearly testified he believed Adderley was a gang member: "Q. Okay. You know that Dukwan is either a Blood or a Crip; correct? At least that's what he's going around claiming? [¶] A. Yes." Also: "Q. Do you remember telling Detective Brown that Dukwan Adderley was a Blood at one point, but you weren't sure if he turned into a Crip . . . at some point? Do you remember telling Detective Brown that? [¶] A. Yeah. I know for sure he turned into a Crip at one point."

There was sufficient evidence of the benefit/direction/association element of the gang enhancement allegation.

(2) *Sufficient evidence of promote/further/assist element.*

Manard argues that "[e]ven if the jury believed that [he] committed the offenses for a gang or to enhance his own status in the gang, neither the evidence nor the expert testimony showed the murder was committed with the specific intent to promote additional crimes by the gang."

As support for this claim, Manard relies on *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1103 ["There is nothing in this record, however, that would support an inference that Garcia robbed Bojorquez with the specific intent to facilitate other criminal conduct by the [gang]"].) But the Ninth Circuit's conclusion, that there must be evidence of an intent to assist in the commission of some felony *other than* the charged crimes, has been uniformly rejected by California case law. "In *Garcia*, the Ninth Circuit found insufficient evidence of specific intent to promote, further, or assist in *other* criminal conduct by the defendant's gang. We disagree with *Garcia*'s interpretation of the California statute, and decline to follow it. [Citations.] By its plain language, the statute requires a showing of specific intent to promote, further, or assist in '*any* criminal conduct by gang members,' rather than *other* criminal conduct. (§ 186.22, subd. (b)(1), italics added.)" (*People v. Romero* (2006) 140 Cal.App.4th 15, 19; accord *People v. Vazquez* (2009) 178 Cal.App.4th 347, 353-354; *People v. Hill* (2006) 142 Cal.App.4th 770, 774.)

In *People v. Gardeley* (1996) 14 Cal.4th 605, the gang expert testified the primary activity of defendants' gang "was to sell narcotics, but that the gang also engaged in witness intimidation and other acts of violence to further its drug-dealing activities." (*Id*. at p. 612.) Given a hypothetical based on the trial evidence, the expert testified the victim's assault and robbery was "a 'classic' example of how a gang uses violence to secure its drug-dealing stronghold. [¶] Detective Boyd explained: It is common practice for several gang members acting in concert to assault a person in full view of residents of an area where the gang sells drugs. Such attacks serve to intimidate the residents

and to dissuade them from reporting the gang's drug-dealing activities to police." (*Id*. at p. 613.) *Gardeley* concluded that, based on this testimony, "the jury could reasonably conclude that the attack . . . was committed 'for the benefit of, at the direction of, or in association with' that gang, and 'with the specific intent to promote, further, or assist in . . . criminal conduct by gang members' as specified in the [gang enhancement statute]." (*Id*. at p. 619.)[7]

Detective Pickett gave analogous testimony here, and Manard's own testimony showed he specifically intended to assist Adderley in robbing the taxi driver. Hence, the evidence was sufficient to prove Manard committed the shooting "for the benefit of, at the direction of, or in association with any criminal street gang . . . ." (§ 186.22, subd. (b)(1).)

There was sufficient evidence of the promote/further/assist element of the gang enhancement.

3. *Gang enhancement on count 2 should be stricken.*

Manard contends the trial court erred by imposing both a 25 years-to-life enhancement for firearm use (§ 12022.53, subds. (d), (e)(1)) and a 10-year gang enhancement on count 2. The Attorney General properly concedes Manard is right.

Subdivision (e)(2) of section 12022.53 provides: "An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, *unless* the person personally used or personally discharged a firearm in the commission of the offense." (Italics added.) In *People v. Brookfield* (2009) 47 Cal.4th 583, as in this case, the "defendant was convicted of a gang-related crime in the commission of which he did *not* personally discharge a firearm, but a companion did." (*Id*. at p. 586.) "[W]e conclude that the word

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[7] Our Supreme Court has granted review in a case that may clarify the use of a gang expert's testimony to prove the gang enhancement elements. That case, *People v. Albillar* (2008) 162 Cal.App.4th 935 (review granted Aug. 13, 2008, S163905), involved a rape-in-concert committed by three gang members.

'enhancement' in section 12022.53(e)(2) refers to both the sentence enhancements in section 186.22 *and* the penalty provisions in that statute. Thus, that provision barred the trial court . . . from imposing *both* the penalty of a life term under section 186.22(b)(4) and the 10-year sentence enhancement under subdivisions (b) and (e)(1) of section 12022.53." (*Id*. at p. 595.)

Here, the trial court imposed both a 25-years-to-life term as a firearm enhancement under section 12022.53, subdivision (d), *and* a 10-year gang enhancement under section 186.22, subdivision (b)(1)(C). Pursuant to section 12022.53, subdivision (j), the trial court must choose the provision that will result in the longer term of imprisonment.[8]

The 10-year gang enhancement imposed on count 2 must be vacated.

4. *Correct abstract of judgment.*

Manard contends, and the Attorney General agrees, there is a clerical error in the abstract of judgment. The trial court announced it was going to stay the sentence on count 2 (attempted robbery) pursuant to the prohibition on multiple punishment (§ 654), but this is not reflected in the abstract of judgment. We will order this error corrected. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [it is proper and important to correct errors and omissions in abstracts of judgment].)

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[8] Section 12022.53, subdivision (j), provides: "When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment for that enhancement pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another enhancement provides for a greater penalty or a longer term of imprisonment."

DISPOSITION

The judgment is affirmed in part and reversed in part. The convictions are affirmed. That portion of the judgment which imposes a 10-year enhancement pursuant to section 186.22, subdivision (b)(1)(C), is reversed. The abstract of judgment shall be amended to reflect that the sentence on count 2 is stayed. The clerk of the superior court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.